Goo Seow Chai v Amalan Tepat Sdn Bhd

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–33 OF 2000
LOW HOP BING J
25 APRIL 2007

Contract — Guarantee — Terms — Construction — Whether purchaser entitled to specific performance under buy-back guarantee

Contract — Breach — Agreement — Whether purchaser in breach of terms of buy-back guarantee

The defendant is the licensed housing developer of a housing development known as A'Famosa Villa Beverly Hills Condominium. By a Sale and Purchase Agreement dated 28 September 1995 ('the SPA'), the plaintiff purchased a unit at the said condominium development at the purchase price of RM153,900. The defendant also issued to the plaintiff a Certificate of Guarantee Buy Back Condominium Scheme dated 15 July 1995, whereby the defendant guaranteed to buy back the unit for a sum of 90% of the purchase price. The guarantee was for a period of three years from the date of signing the SPA or until the Certificate of Fitness of the property is issued. By a letter from its solicitors dated 12 May 1998, the plaintiff gave notice to the defendant to buy back the unit at 90% of the purchase price. The defendant refused. The plaintiff's claim inter alia was for specific performance of the Certificate of Guarantee Buy Back Condominium Scheme or, alternatively, judgment in the sum of RM138,500, special damages of RM791 per month from March 1998 and damages for breach of contract.

Held, dismissing the plaintiff's claim with costs:

(1) The buy-back guarantee is a conditional contract whereby the plaintiff has to fulfill all the conditions before it could be legally and specifically enforced. One of the essential and fundamental conditions is that the Plaintiff must settle all payments due and payable under the SPA (see para 13).

(2) The plaintiff, having paid only 65% of the purchase price, has failed to fulfill the conditions of the buy-back guarantee and is in breach of the SPA. Consequently, the plaintiff's claim for specific performance of the buy-back guarantee is premature. The plaintiff's non-fulfillment of the pre-condition also renders her alternative claim for RM138,500 and claim for special damages premature (see paras 14, 17, 18).

[Bahasa Malaysia summary

Defendan merupakan pemaju perumahan berlesen untuk pembangunan perumahan dikenali sebagai Kondominium A Famosa Villa Beverly Hills. Melalui Perjanjian Jual Beli bertarikh 28 September 1995 ('PJB'), plaintif telah membeli satu unit di pembangunan kondominium itu pada harga belian RM153,900.00. Defendan juga mengeluarkan kepada plaintif Skim Sijil Jaminan Membeli Balik Kondominium bertarikh 15 Julai 1995, di mana defendan menjamin akan membeli balik unit itu untuk jumlah 90% daripada harga belian. Jaminan itu adalah untuk tempoh tiga tahun daripada tarikh menandatangani PJB atau sehingga Sijil Layak Menduduki hartanah tersebut dikeluarkan. Melalui surat daripada peguamnya bertarikh 12 Mei 1998, plaintif telah memberikan notis kepada defendan untuk membeli balik unit tersebut pada 90% harga jualan. Defendan enggan. Tuntutan plaintif, antara lain, adalah untuk perlaksanaan spesifik bagi Skim Sijil Jaminan Membeli Balik Kondominium, atau alternatifnya penghakiman untuk jumlah sebanyak RM138,500.00, gantirugi khas sebanyak RM791.00 sebulan dari Mac 1998 dan gantirugi kerana memungkiri kontrak.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Jaminan beli-balik adalah kontrak bersyarat yang mana plaintif hendaklah memenuhi kesemua syarat-syarat sebelum ia sah dijalankan secara terperinci. Salah satu syarat yang penting dan asas adalah plaintif mestilah menjelaskan kesemua bayaran yang tertunggak dan kena dibayar di bawah PJB.

(2) Plaintif, yang hanya membayar 65% daripada harga belian, gagal untuk memenuhi syarat-syarat jaminan beli-balik dan memungkiri PJB. Akibatnya, tuntutan plaintif untuk perlaksanaan spesifik jaminan beli-balik adalah pra matang. Ketidakpatuhan plaintif kepada pra-syarat juga menyebabkan tuntutan alternatifnya sebanyak RM138,500.00 dan tuntutan untuk gantirugi khas juga menjadi pra matang.]

Notes

For cases on terms of contract, see 3 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2394–(to be checked).

Pang Hok Liong (CC Aiyathurai & Co) for the plaintiff.
Wan Mohd Khoemeni (Tee, Tan & Partners) for the defendant.

Low Hop Bing J:

PLAINTIFF'S CLAIM

[1] This is the plaintiff's claim for:

(1) Specific performance of the Certificate of Guarantee Buy Back Condominium Scheme dated 15 July 1995 ('the buy-back guarantee');

(2) Alternatively, judgment in the sum of RM138,500;

(3) Special damages at RM791 per month from March 1998 until the defendant has purchased the condominium unit from the plaintiff;

(4) Damages for breach of contract in lieu of or in addition to specific performance and interest thereon at 8% pa from the date of judgment to the date of realisation; and

(5) Costs.

AGREED FACTS

[2] The parties herein have set out the facts agreed by them in encl (78), which may be recounted as follows.

[3] The defendant is a licensed housing developer and the registered and beneficial owner of the land held under HS (D) 3386 PT No 61 in the mukim of Pegoh, the district of Alor Gajah consisting of about 2599 hectares ('the land') which the defendant was and is developing into a housing development known as A'Famosa Villa Beverly Hills Condominium ('the condominium').

[4] By a sale and purchase agreement dated 28 September 1995 ('the SPA'), the defendant agreed to sell and the plaintiff agreed to purchase a parcel with vacant possession of the condominium ('the unit') at the purchase price of RM153,900 ('the purchase price') which includes inter alia:

(1) free membership to the plaintiff of the defendant's golf course, fruit orchard, theme water park, butterfly farm and equestrian park;

(2) the buy-back gurantee;

(3) payment by the defendant of all interest accrued on the plaintiff's loan sum disbursed by Utama Bank Bhd ('the bank') towards payment of the purchase price during the period of construction until the handing over of vacant possession; and

(4) certificate of rental by the defendant to guarantee the plaintiff a rental return of 15% pa of the purchase price of the unit for the period of one year.

[5] The plaintiff took a loan of RM123,120 ('the loan') from the bank to finance the purchase price of the unit and paid a total sum of RM100,035 to the defendant, representing 65% of the purchase price.

[6] On the loan, commencing March 1998, the plaintiff has to pay a sum of RM791 per month to the bank.

[7] The plaintiff, on 6 December 1997, issued to the defendant a letter of undertaking.

[8] Vide solicitors' letter dated 12 May 1998 addressed to the defendant, the plaintiff gave notice to the defendant to buy back the unit at 90% (ie RM138,510) of the purchase price within seven days thereof.

BUY-BACK GUARANTEE

[9] For the purpose of obtaining the decree of specific performance of the buy-back guarantee against the defendant, the plaintiff's learned counsel, Mr Pang Hok Liong, relied on the terms thereof to ask for an order to compel the defendant to buy back the unit at a sum representing 90% of the purchase price in the SPA.

[10] The defendant's learned counsel Mr Wan Mohd Khoemeni's response is that the plaintiff has breached the SPA in that she has failed, neglected or refused to pay the outstanding amount of, inter alia, RM53,865 and so is not entitled to the equitable remedy of specific performance.

[11] The above submissions and factual background show the common ground that the plaintiff has merely paid RM100,035 or 65% of the purchase price of RM153,900.

[12] In my view, the defendant's buy-back guarantee which is an integral part of the SPA sets out the rights and obligations of the parties in the following words:

> CERTIFICATE OF GUARANTEE BUY BACK CONDOMINIUM SCHEME
>
> We hereby confirm that we guarantee the Purchaser(s) GOO SEOW CHAI of Unit No. 71/D/15-2 (hereinafter referred to as the Property) with a buy back condo scheme of a sum of 90% of the purchase price as stated in the S & P Agreement of the said property for (i) a period of three (3) years from the date of signing the Sale and Purchase Agreement OR (ii) a period until Certificate of Fitness of the said Property is issued whichever is earlier provided that:
>
> a) all payments due and payable under the Sale and Purchase Agreement has been settled.
>
> b) the purchaser must sign a Letter of Undertaking to the developer in respect of the buy back scheme. c) all the promotional package e.g. Golf membership and other memberships must be surrendered back to the Developer.

[13] The buy-back guarantee is a conditional contract whereby the plaintiff has to fulfil all the conditions before she can legally and specifically enforce it. One of the essential and fundamental conditions is item (a), ie, the plaintiff must settle all payments due and payable under the SPA.

[14] However, the plaintiff has merely paid 65% of the purchase price. The plaintiff's failure to fulfil item (a) means that the plaintiff is in breach of the

terms of the SPA. Consequently, her claim for specific performance of the buy-back guarantee is premature, and so she is not entitled to the decree thereof. Being an equitable or discretionary remedy, the decree of specific performance is governed by various maxims of equity, two of which are that he (she) who comes to equity must do equity or must come with clean hands. As it is obvious that she is in breach of the SPA, she cannot specifically enforce the buy-back guarantee against the defendant.

ALTERNATIVE CLAIM FOR RM138,500

[15] The plaintiff argued that she is entitled to the alternative claim for RM138,500 on her undertaking to perform and comply with the conditions stated in the buy-back guarantee.

[16] It was submitted for the defendant that the plaintiff's claim is also premature as she has not fulfilled all the conditions in the buy-back guarantee.

[17] In my view, the resolution to the above submissions is again to be arrived at upon a true construction of the buy-back guarantee. As it is abundantly clear to me that the plaintiff has not fulfilled condition (a) contained in the buy-back guarantee, her claim is plainly premature. It is significant to note that her claim is for the sum of RM138,000 representing 90% of the purchase price pursuant to the SPA, while she has merely paid a total of RM100,035 which is only 65% thereof. Such a claim is beyond my powers of comprehension.

SPECIAL AND OTHER DAMAGES

[18] The plaintiff's non-fulfilment and indeed breach of item (a) in the buy-back guarantee similarly militates against her claim for special damages at RM791 per month and other damages prayed for in her statement of claim, which are also plainly premature.

CONCLUSION

[19] The plaintiff has failed in establishing her claim against the defendant. I therefore dismiss it with costs.

Plaintiff's claim dismissed with costs.

Reported by Brendan Navin Siva